

November 2, 2001

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**
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REPORT AND DECISION ON APPEAL OF NOTICE AND ORDER

SUBJECT: Department of Development and Environmental Services File No. **E0001896**

RICHARD HIGUERA & RUDY/BEVERLY STARKOVICH
Code Enforcement Appeal

Location: 17242 SE Petrovitsky Road

Appellants: **Richard Higuera**
P.O. Box 63
Ravensdale, WA 98051
Telephone: (425) 413-1896

Rudy & Beverly Starkovich
810 North Riverside Drive
Renton, WA 98055
Telephone: (425) 226-3704
Facsimile: (425) 228-3703

King County: Department of Development and Environmental Services,
Land Use Services Division, *represented by*
Christina Tiffany
900 Oakesdale Avenue SW
Renton, WA 98055-1219
Telephone: (206) 296-7049
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SUMMARY OF RECOMMENDATIONS:

Department's Preliminary Recommendation:
Department's Final Recommendation:
Examiner's Decision:

Deny
Deny
Grant in part;
Deny in part

EXAMINER PROCEEDINGS:

Hearing Opened:

August 28, 2001

Hearing Closed:

September 17, 2001

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

KEY WORDS/TOPICS ADDRESSED:

- Sensitive areas
- Wetland
- Wetland buffer area
- Grading
- Clearing

SUMMARY:

Grants appeal of previous property owner; denies appeal of present property owner.

This matter was continued until September 17 in order to obtain the written statement of Kathy Newborn and to provide the Appellants opportunity to respond to Ms. Newborn's statement. The parties waived the KCC 20.24.098 time limits to the extent necessary to complete this review. Neither Appellant responded to Ms. Newborn's statement, incorporated in the hearing record as exhibit no. 36.

FINDINGS:

1. **Notice and Order Served.** On April 27, 2001, the Department of Development and Environmental Services ("Department" or "DDES") served upon the above-named parties a notice of King County code violation; civil penalty order; abatement order; notice of lien; duty to notify (hereinafter, "notice and order"). That notice and order, concerning 17242 SE Petrovitsky Road, also identified as tax assessor lot no. 770260-0870 and as lot 73 of block 2 of Shady Lake Addition, cites both the present (Higuera/Stockwell) and preceding (Starkovich) property owners with the following violations:

- Clearing and/or grading within a sensitive area and buffer (wetland) without the required permits and/or approvals.
- Clearing and/or grading within a rural shoreline environment without the required permits and/or approvals.

The first citation cites KCC 16.82.060 and -- .140 as authority. The second citation refers to KCC 25.32.010. The notice and order commands Higuera/Stockwell and Starkovich to take the following actions in order to bring the property into code compliance:

- Apply for and obtain a valid grading permit. The application shall address at a minimum the restoration of sensitive areas pursuant to KCC 21A.24.340.A and must be completed in accordance with the guidelines outlined in King County Development Assistance Bulletin No. 28.

- Apply for and obtain a shoreline management substantial development permit or a shoreline exemption.

The notice and order requires compliance with both directives by July 2, 2001. That compliance date is stayed, however, by the appeal.

2. **Appeal Filed.** Higuera, Stockwell and Starkovich filed appeal timely. Appellants Starkovich, the preceding owners of the subject property (sold August 1, 2000) argue that they did not own the property when the grading and clearing at issue was completed. Rather, they argue that the clearing and grading of concern was accomplished wholly during the ownership of Higuera and Stockwell. Appellants Higuera and Stockwell, for their part, argue that the notice and order is unjust or unlawful because:

A construction company (Pavetti Brothers) put the fill there covering half of the land. The same construction company unplugged an old storm drain that had been plugged for at least 20 years and flooded the property with the assistance of the Cedar Water District.

3. **General Findings.** The following findings are relevant to the issues at hand:

- a. The wetlands at issue are associated with Shady Lake. Because they are associated with Shady Lake, any development activity within the wetlands or buffer area abutting the lake/wetlands falls under both sensitive areas regulation (KCC 20.24) and shoreline management regulation (KCC Title 25 and RCW 90.50).
- b. King County Ordinance No. 3689 (adopted May 2, 1978) designates and adopts Shady Lake as a Rural shoreline environment. It is, therefore, subject to Rural regulations which are generally more stringent than Urban shoreline management regulations.
- c. Shoreline management definition of wetland, associated wetland or wetland areas contained in KCC 25.08.610 indicates that those areas extending landward for 200 feet in all directions as measured on a horizontal plane from the ordinary high water mark and all marshes, bogs, swamps, floodways, river deltas and the entire 100 foot plain associated with lakes, are subject to the provisions of shoreline management regulation.
- d. KCC 25.16.190 prohibits wetlands from being disturbed or altered through excavation, filling or dredging or disposal of dredged materials unless DDES has determined that the wetland does not serve any valuable functions.
- e. The subject property is generally pie shaped, with the narrowest side of the isosceles triangle abutting Southeast Petrovitsky Road and the point of the triangle jutting into Shady Lake. See, for instance, exhibits no. 7, 10 and 23.
- f. The Shady Lake wetland and open water components are designated as sensitive areas. See exhibit nos. 28 and 31.

4. **Wetland characteristics.** DDES determined that, based on wetland delineation results, site characteristics and King County soil mapping data, the disputed grading and clearing activities occurred in violation of wetland and wetland buffer boundaries. Bill Kerschke, Sr. Ecologist of the Department's Land Use Services Division reported that, "the entire fill/grading area in the southern portion of the parcel appears to be within the wetland boundary."

The routine wetland delineation method is described by the Washington State Wetlands Identification and Delineation manual. Use of that manual is required by King County code. An area is considered *jurisdictional wetland* when hydrophytic (wetland) vegetation, hydric (wetland) soils and wetland hydrology are present. In this investigation, Mr. Kerschke found all three wetland indicators – hydrophytic vegetation, hydric soils within ten inches of the soil surface and the presence of wetland hydrology. To make this determination, Mr. Kerschke referred to the King County soil survey (1973), King County wetland inventory, and identified dominant plants in the area. Finally, he dug five sample soil pits, as well as a hand auger to investigate soil's depth to approximately 18 inches below the ground surface. Positive indicators of hydric soils included high organic content, dark soil colors, mottling and sulfide or “rotten egg” odors. According to the Munsell Soil Color charts, these soils show a high degree of saturation -- evidence of inundation. Wetland vegetative species located in the area of concern include Douglas spirea, salmonberry, creeping buttercup, black cottonwood, willow, reed canary grass, and small fruited bullrush. Peat and muck were observed below the fill material in some of the test holes.

Higuera argues that the wetland conditions are caused by upstream drainage resulting from land development and culvert clearing. Starkovich argues that the area has been historically used as open lawn and therefore, should not be regarded as a wetland area. Old photographs endeavoring to demonstrate this position are contained in the hearing record.

5. **Photographs in evidence.** The photographs contained in exhibit no. 25 show the nature of wetland vegetation and wetland soils extant at the exploration locations within the wetland area of concern. In addition, standing water is found near Petrovitsky Road. Exhibit no. 6 photographs demonstrate the extent of grading and clearing within the wetland area.
6. **Aerial photos.** The Department has introduced numerous aerial photos (exhibit nos. 11, 12 and 13) in order to demonstrate that some of the clearing and grading occurred during Starkovich ownership. The examiner finds these photographs inconclusive.
7. **Case history.** Kathy Flynn and Chris Tiffany, Site Development Specialists, representing DDES, inspected the subject property while inspecting erosion control for sewer line installation. The sewer line installation was permitted pursuant to a King County grading permit and conducted by Pevetty on behalf of the Cedar River Water and Sewer District. On January 26, 2000 inspection they found a stockpile of dirt approximately 15 feet high by 30 feet wide by 50 feet long on top of older fill consisting of decayed remains of landscape debris. On December 4, 2000, Ms. Tiffany entered the property and found that numerous mature red alders and black cottonwoods had been cut down within a wetland and the shoreline of Shady Lake. On December 8, 2000 Ms. Stockwell advised Ms. Tiffany that she had oral approval from DDES to remove trees less than 18 inches in diameter. On January 18, 2000 Mr. Higuera explained that the contractor installing the sewer line for the Cedar River Water and Sewer District had left the fill on the property. Mr. Pevetty categorically denies that. Any fill materials stored on the property due to sewer line installation were temporarily stored, protected by silt fence, and subsequently removed. He testified that he placed the stockpile upon permission granted by previous landowner Starkovich. Upon Starkovich's request, due to Starkovich's intention to sell the property, the stockpile was removed and the area hydroseeded.
8. **Department report adopted.** The Department's report to the Examiner, entered as exhibit no. 1 is accurate and is incorporated here by this reference.

CONCLUSIONS:

1. The evidence does not conclusively demonstrate violations of the nature contained in the appealed notice and order during the Starkovich ownership period. While there is some evidence of filling and earth movement during the Starkovich period, there is no evidence that such activities occurred since adoption of sensitive areas regulations by King County. Even though the shoreline management regulations reach much further back, to the early 1970's, this hearing record does not contain sufficient evidence to require the Starkovich's to back track through that history to obtain shoreline management permission or exemption.
2. With regard to the period following sale of the subject property from Starkovich to Higuera/Stockwell, the evidence against the Appellants is more than preponderant, it is abundant. The photographs and history, combined with the wetland soils, vegetation and saturation amply demonstrates that grading and filling occurred during the Higuera/Stockwell ownership; and, that this grading/clearing occurred within sensitive areas regulated by KCC 16.82 (grading), KCC 20.24 (sensitive areas; wetlands; wetland buffers) and KCC Title 25 (Shoreline Management).

DECISION:

- A. The Starkovich appeal is GRANTED. The Starkovich's are wholly released from any liability or responsibility to King County regarding the subject notice and order.
- B. The appeal of Higuera/Stockwell is DENIED. However, no civil penalties have accrued to this date.

ORDER:

Appellants Higuera/Stockwell shall apply for and obtain a valid grading permit. Further, they shall apply for and obtain *either* a shoreline substantial development permit *or* a shoreline management exemption.

Higuera/Stockwell shall comply with this order **by November 14, 2001** or shall incur an initial civil penalty for each unresolved violation in the amount of \$1,200. Failure to comply **by December 14, 2001** shall cause an additional \$1,800 civil penalty for each unresolved violation. Failure to comply with the order **by December 31, 2001** shall result in yet another civil penalty for each unresolved violation in the amount of \$2,400. Other terms of enforcement contained in the Department's April 27, 2001 notice and order remain in full effect.

This order shall not be construed as limiting the authority of DDES or the King County Prosecutor in prosecuting this matter in any other manner provided by law.

ORDERED this 2nd day of November, 2001.

R. S. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 2nd day of November, 2001, by certified mailing to the following parties:

Richard Higuera/Kathleen Stockwell
P.O. Box 63
Ravensdale, WA 98051

Rudy & Beverly Starkovich
810 North Riverside Drive
Renton, WA 98055

TRANSMITTED this 2nd day of November, 2001, to the following parties and interested persons:

Richard Higuera
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Renton, WA 98058-9799

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE AUGUST 28, 2001 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO: E0001896

R. S. Titus was the Hearing Examiner in this matter. Participating in the hearing and representing the Department was Christina Tiffany, Kathy Flinn Newborn and Bill Kerschke. Participating in the hearing and representing the Appellant was Richard Higuera and Beverly Starkovich. Others participating in this hearing were Kirk Hunkeler and Mark Pivetta.

The following exhibits were offered and entered into the record:

- Exhibit No. 1 King County DDES Staff Report to the Hearing Examiner
- Exhibit No. 2 October 18, 1999 Inspection Log Notes
- Exhibit No. 3 August 8, 1999 Approved Plans for L99CG320 Sheet 3 of 20
- Exhibit No. 4 November 28, 1999 Site Map locating violation drawn by Robert Manns
- Exhibit No. 5 December 4, 2000 Stop Work Order and Appeal
- Exhibit No. 6 December 4, 2000 Photographs by Chris Tiffany
- Exhibit No. 7 December 4, 2000 Site Map drawn by Chris Tiffany
- Exhibit No. 8 June 15, 2000 and August 14, 2000 DDES Walk-in Records
- Exhibit No. 9 August 6, 2001 Memorandum from David Sandstrom

- Exhibit No. 10 July 16, 1990 Copy of an aerial photograph of the site
- Exhibit No. 11 September 22, 1995 Copy of an aerial photograph of the site
- Exhibit No. 12 September 19, 1997 Copy of aerial photograph of the site
- Exhibit No. 13 August 23, 1999 Copy of an aerial photograph of the site
- Exhibit No. 14 January 2, 2001 Letter from DDES to Kay Stockwell and Richard Higuera
- Exhibit No. 15 Permission to Pivetta Brothers to stockpile on the site
- Exhibit No. 16 March 1, 2001 Letter from DDES to Kay Stockwell and Richard Higuera
- Exhibit No. 17 April 9, 2001 Letter from Kay Stockwell to Chris Tiffany
- Exhibit No. 18 April 27, 2001 Notice and Order
- Exhibit No. 19 May 7, 2001 Appeal from Starkovich
- Exhibit No. 20 May 12, 2001 Appeal from Higuera/Stockwell
- Exhibit No. 21 July 9, 2001 Notice of Pre-Hearing Conference
- Exhibit No. 22 July 23, 2002 Pre-Hearing Order
- Exhibit No. 23 July 26, 2001 Site Map with test hole and fill locations
- Exhibit No. 24 August 9, 2001 Memorandum from Bill Kerschke
- Exhibit No. 25 July 26, 2001 Photographs taken by Chris Tiffany
- Exhibit No. 26 April 1978 King County Shoreline Master Program Supplement excerpts
- Exhibit No. 27 August 10, 1999 Decision approving King County Forest Practices Ordinance
- Exhibit No. 28 1990 King County Sensitive Area Map Folio excerpts
- Exhibit No. 29 1973 King County Soil Survey excerpts
- Exhibit No. 30 October 1988 Hydric Soils of the State of Washington excerpts
- Exhibit No. 31 DDES Geographic Information Services map of hydrologic sensitive areas for the site
- Exhibit No. 32 King County Witness List
- Exhibit No. 33 DDES Case file notes
- Exhibit No. 34 Memo from Chris Tiffany to Stan Titus dated 8/20/01 and information from Mark Pivetta
- Exhibit No. 35 Photographs from Ms. Starkovich dated July 1970 and August 1972

Entered pursuant to administrative continuance:

- Exhibit No. 36 Statement of DDES Inspector Kathy Newborn, provided September 5, 2001